

ORAL ARGUMENT NOT YET SCHEDULED

CASE NOS. 18-1092, 18-1156 & 18-1228

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DIRECTV, LLC,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW
FROM ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF OF PETITIONER

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**CORPORATE DISCLOSURE STATEMENT
PURSUANT TO CIRCUIT RULE 26.1**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner DIRECTV, LLC (“DIRECTV”), a California limited liability company providing broadcast satellite television services to consumers in the United States, is a wholly-owned subsidiary of DIRECTV Holdings LLC. DIRECTV Holdings LLC, a Delaware limited liability company, is a wholly-owned subsidiary of The DIRECTV Group, Inc. The DIRECTV Group, Inc., a Delaware corporation, is a wholly-owned subsidiary of DIRECTV Group Holdings, LLC. DIRECTV Group Holdings, LLC, a Delaware limited liability company, is a wholly-owned subsidiary of AT&T, Inc. AT&T, Inc., a Delaware corporation, is a publicly-traded company on the New York Stock Exchange. No one person or group owns 10% or more of the stock of AT&T, Inc.

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici.

1. DIRECTV is the Petitioner in Case No. 18-1228, which has been consolidated with Case No. 18-1092.

2. DirectSat USA, LLC (“DirectSat”) is the Petitioner in Case No. 18-1092.

3. The National Labor Relations Board (“NLRB” or the “Board”) is the Respondent.

B. Rulings Under Review.

DIRECTV seeks review of the NLRB's Order captioned as *DirectSat USA, LLC and International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO*, Case No. 13-CA-176621, entered July 25, 2018 and published at 366 NLRB No. 141.

C. Related Cases.

The instant case has not previously been before this Court or any other court. It is, however, related to, and has been consolidated with, *DirectSat USA LLC v. National Labor Relations Board*, No. 18-1092, currently pending before this Court. This Petition for Review arises out of the NLRB's denial of DIRECTV's Motion to Intervene, Re-Open the Record and for Reconsideration ("Motion to Intervene") in that case when it was before the NLRB.

STATEMENT REGARDING ORAL ARGUMENT

The NLRB improperly denied DIRECTV's Motion to Intervene in an unfair labor practice case involving DIRECTV's contractor, DirectSat, in which the NLRB ordered DirectSat to disclose DIRECTV's confidential information. Oral argument may be helpful to the Court in addressing the important question of the circumstances under which a third party may intervene in an NLRB unfair labor practice case to protect that third party's confidential information.

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GLOSSARY

NLRA or Act: National Labor Relations Act

NLRB or Board: National Labor Relations Board

ALJ: Administrative Law Judge

HSP: Home Services Provider Agreement

JURISDICTIONAL STATMENT

This is a petition for review from a decision of the Board. This Court has jurisdiction pursuant to Section 10 of the National Labor Relations Act (the “NLRA” or the “Act”), 29 U.S.C. § 160. The Board’s Order is final with respect to all parties. DIRECTV, as an aggrieved party, filed its petition for review in this Court on August 24, 2018, pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f). The Act does not specify any time period for filing a petition for review.

STATEMENT OF ISSUES

1. Whether the NLRB erred in denying DIRECTV’s Motion to Intervene in *DirectSat USA, LLC*, Case 13-CA-176621, and in doing so, failed to consider or accord weight to DIRECTV’s confidentiality interest in the Home Services Provider Agreement (“HSP”) between DIRECTV and DirectSat.

2. Whether the NLRB erred in finding that DIRECTV’s Motion to Intervene, filed after the Board issued its decision requiring disclosure of the HSP, was untimely in the absence of substantial evidence that DIRECTV had notice that its rights were in jeopardy prior to the issuance of the Board’s decision.

3. Whether the NLRB erred in finding that it was not necessary for DIRECTV to intervene in *DirectSat USA, LLC*, Case 13-CA-176621, because DirectSat and DIRECTV shared a “community of interest” in protecting the HSP’s confidential information, and DirectSat could adequately defend DIRECTV’s

interest before the NLRB, even though DirectSat had failed to raise any confidentiality defense against disclosure.

RELEVANT STATUTES AND REGULATIONS

Section 10 of the NLRA, 29 U.S.C. § 160:

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

...In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony...

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 102.29 of the Board's Rules and Regulations:

§102.29 Intervention; requisites; rulings on motions to intervene.

Any person desiring to intervene in any proceeding must file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion must be filed with the Regional Director issuing the complaint; during the hearing, such motion must be made to the Administrative Law Judge. Immediately upon filing a written motion, the moving party must serve a copy on the other parties. The Regional Director will rule upon all such motions filed prior to the hearing, and will serve a copy of the rulings on the other parties, or may refer the motion to the Administrative Law Judge for ruling. The Administrative Law Judge will rule upon all such motions made at the hearing or referred to the Judge by the Regional Director, in the manner set forth in §102.25. The Regional Director or the Administrative Law Judge, as the case may be, may, by order, permit intervention in person, or by counsel or other representative, to such extent and upon such terms as may be deemed proper.

STATEMENT OF THE CASE

A. DIRECTV's Business.

DIRECTV provides broadcast satellite television services to consumers in the United States. (JA295)¹ DIRECTV is a party to the HSP with DirectSat, through which DirectSat provides installation and repair services to DIRECTV subscribers. (*Id.*)

B. Underlying Proceedings.

On February 11, 2014, International Brotherhood of Electrical Workers Local 21 ("Union") was certified as the bargaining representative of some of

¹ The Amended Declaration of Jon Sellers, Assistant Vice President – Network Services, ("Am. Sellers Dec.") was attached to DIRECTV's Reply in Support of its Motion to Intervene, Re-Open the Record and for Reconsideration ("Reply"). (JA294-96).

DirectSat's employees in Mokena, Illinois.² Thereafter, DirectSat began bargaining with the Union. During the course of bargaining, the Union requested that DirectSat provide a copy of the HSP between DirectSat and DIRECTV to the Union. The HSP had been referenced in one of DirectSat's proposals regarding the scope of bargaining unit work. The Union also asserted that it needed the HSP to evaluate the extent of control of DirectSat by DIRECTV. DirectSat provided what it believed to be the relevant portions of the agreement but refused to provide other portions. Thereafter, the Union filed an unfair labor practice charge alleging that DirectSat violated Section 8(a)(5) of the Act by failing to provide the entire, unredacted HSP. Unbeknownst to DIRECTV, a complaint issued, and the parties submitted the case to the ALJ on a stipulated record.

The General Counsel contended that the Union needed to review the full, unredacted HSP between DirectSat and DIRECTV "in order to determine whether those entities were joint employers for the purposes of collective bargaining, or alternately to verify [DirectSat's] claims about the nature of their relationship." 366 NLRB No. 40, slip op. at 1. (JA258) The ALJ rejected both of these arguments but nonetheless found that the Union was entitled to see the full HSP "to verify [DirectSat's] claim that it had furnished all portions of that document

² The facts of this case are set forth in the Administrative Law Judge's ("ALJ") decision. *DirectSat USA, LLC*, 366 NLRB No. 40, slip op. at 3-5 (Mar. 20, 2018). (JA260-62)

relative to the scope of bargaining-unit work.” *Id.* (JA258) DirectSat filed exceptions to the ALJ’s decision, but the Board affirmed the decision on yet another, different basis, namely that the HSP was relevant to negotiations because DirectSat’s proposal regarding new product lines amounted to having the scope of bargaining-unit work defined by the HSP. *Id.* at 2. (JA259) Critically, in reaching its conclusion, the Board observed that DirectSat did not object to disclosing the full HSP on the grounds that doing so could reveal confidential, proprietary or trade-secret information. *Id.* at 2 n.4.³ (*Id.*)

C. The HSP Contains DIRECTV’s Confidential and Proprietary Information.

Irrespective of whether or not the HSP contains any of DirectSat’s confidential and proprietary information, it does contain DIRECTV’s confidential and proprietary information. The HSP contains non-public information about DIRECTV’s pricing, commission rates, service territories, service and installation processes, quality standards, sales processes, and incentive structure, which if disclosed could provide an advantage to DIRECTV’s competitors. (JA259) Recognizing the importance of maintaining the privacy of DIRECTV’s confidential and proprietary information, Section 23 of the HSP contractually

³ Specifically, the Board stated, “We further note that the Respondent [DirectSat] did not, at any point, object to disclosing the full HSP on grounds that doing so could reveal information of a confidential, proprietary, or trade-secret nature. In addition, Member Emanuel observed that the Respondent did not assert a confidentiality interest in its exceptions.” *Id.* at 2 n.4. (JA259)

includes terms to protect that information from disclosure. First, Section 23(a) of the HSP specifically defines “Confidential Information” to include “the terms of this Agreement.” (*Id.*) Section 23(b) next prohibits DirectSat from using Confidential Information “for any reason whatsoever (other than to perform this Agreement)” and requires DirectSat to ensure that DIRECTV’s Confidential Information is protected. (*Id.*)

The HSP also includes a procedure for handling court or government agency directives to disclose confidential information provided pursuant to the agreement. (*Id.*) Section 23(d) of the HSP agreement provides that before disclosing any such confidential information pursuant to a government agency or court order, DirectSat must first “provide[] notice to DIRECTV prior to any such disclosure and use[] reasonable efforts to obtain confidential treatment for the information” to avoid violating its confidentiality obligation. (*Id.*)

Further, under Section 8(c)(x) of the HSP, it would be a non-curable breach of the agreement for DirectSat to fail to meet its obligations regarding the use or disclosure of DIRECTV’s confidential information. (*Id.*) In short, the HSP recognizes that the HSP contains DIRECTV’s confidential and proprietary information, and the HSP expressly requires that such confidential information to be protected from disclosure.

D. DIRECTV Did Not Receive Notice of the Potential Disclosure of Its Confidential Information Until After the Board Issued Its Order.

In November/December 2016, DIRECTV had discussions with DirectSat about producing a redacted copy of the HSP to the Union, which would protect DIRECTV's most sensitive commercial secrets. DIRECTV believed those discussions arose in the context of DirectSat's negotiations with the Union to resolve an NLRB charge. (*Id.*) DIRECTV did not hear anything further from DirectSat on the issue after those discussions, and, therefore, believed the issue had been resolved. (*Id.*) Indeed, DIRECTV had no further knowledge of the proceedings before the ALJ and the Board until DirectSat informed DIRECTV of the Board's March 20, 2018 decision. (*Id.*)

E. DIRECTV Filed a Motion to Intervene, Which the Board Denied.

Upon being advised after the fact of the ALJ and Board proceedings and the Board's ruling requiring disclosure of its confidential and proprietary information, DIRECTV promptly filed its Motion to Intervene on April 4, 2018 pursuant to Section 102.29 of the Board's Rules and Regulations.⁴ (JA267-79) On April 19,

⁴ One day before DIRECTV filed its Motion to Intervene, on April 3, 2018, DirectSat filed a petition with this Court to review the Board's Order [Doc. No. 172557], and in turn, this Court issued an Order requiring, among other things, that the Board file the certified index to the record by May 21, 2018 [Doc. No. 1725582]. On May 17, 2018, however, the Board filed an Unopposed Motion for Extension of Time to File Certified List "until 7 days after the Board rules" on DIRECTV's Motion to Intervene. [Doc. No. 1731600]. On May, 18, 2018 this

2018, Counsel for the General Counsel and the Union filed their Joint Response in Opposition to DIRECTV Motion to Intervene, and on April 25, 2018, DIRECTV filed its Reply. (JA280-85; JA286-96)

On July 25, 2018, the Board denied DIRECTV's Motion to Intervene. *See DirectSat USA, LLC*, 366 NLRB No. 141 (2018). (JA297) The Board's decision rested on two grounds: 1) that DIRECTV's Motion to Intervene was untimely, and 2) that, in any event, DIRECTV was not a necessary party to the case because DirectSat was able to adequately defend against disclosure of the HSP. *Id.*

SUMMARY OF THE ARGUMENT

First, the evidence established and the Board implicitly acknowledged that DIRECTV has a protectable confidentiality interest in the HSP. But contrary to *Detroit Edison v. NLRB*, 414 U.S. 301, 315-16 (1973), the Board disregarded DIRECTV's confidentiality interest in denying its Motion to Intervene. Even though the NLRB had not yet lost jurisdiction of the case at the time DIRECTV filed its Motion, the Board failed to consider the purpose of the Motion to Intervene and the confidentiality interest at stake. Thus, the Board erred by not considering or weighing DIRECTV's confidentiality interest in denying DIRECTV's Motion.

Second, the Board relied on flawed factual findings in determining that

Court granted the motion. [Doc. No. 1731817].

DIRECTV's Motion to Intervene was untimely. The Board ignored the unrebutted record evidence that DIRECTV had no notice of proceedings until the Board issued its Order; instead, it relied on pure supposition to find that DIRECTV "should have known" about the threat to its confidentiality interest and intervened earlier. These findings resulted in a conclusion that is contrary to Board precedent in which post-hearing intervention has been permitted and other legal authority explaining that the timeliness of a motion to intervene must be considered in light of all the circumstances of the case.

Third, the Board majority erred by concluding that because DirectSat and DIRECTV shared a "community of interest" in protecting the HSP's confidential information, DIRECTV was not a "necessary party" to the case and DirectSat could adequately defend DIRECTV's interest. Although DIRECTV and DirectSat had overlapping interests as a result of DirectSat's contractual obligations regarding DIRECTV's confidential information, courts have recognized in the intervention context that shared interests do not guarantee the intervenor's interest in protecting its confidential information will be adequately represented, as was the case here. Although the Board evaluated DirectSat's representation of DIRECTV's interest from a hypothetical perspective (*i.e.*, what DirectSat could have done), the record evidence establishes that DirectSat, in fact, failed to raise any confidentiality defense, thereby waiving it and leaving DIRECTV with no

choice but to intervene to protect its interest. DirectSat's conduct hardly demonstrates adequate representation. Moreover, contrary to the Board's finding, DirectSat's lack-of-relevance argument alone was not sufficient to adequately defend DIRECTV's confidentiality concerns because relevance and confidentiality are two distinct considerations that cannot be substituted for each other.

Therefore, DIRECTV respectfully requests that the Court grant its Petition for Review, deny enforcement of the Board's Order requiring DirectSat to provide the full, unredacted copy of the HSP, and remand this case to the NLRB.

STANDING

DIRECTV has standing to seek review in this Court as an aggrieved party to a final order of the Board pursuant to 29 U.S.C. § 160(f). *See Retail Clerks Union 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965).

ARGUMENT

I. STANDARD OF REVIEW.

The Court “will uphold a decision of the Board unless it relied upon findings that are not supported by substantial evidence, failed to apply the proper legal standard, or departed from its precedent without providing a reasoned justification for doing so.” *E.I. Du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012). But the Court should not “merely rubber-stamp NLRB decisions.” *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002). Instead, the “review must take into account whatever in the record fairly detracts from the

weight of the evidence cited by the Board to support its conclusions.” *Dover Energy, Inc. v. NLRB*, 818 F.3d 725, 729 (D.C. Cir. 2016) (internal quotation marks and citation omitted). The Court should set aside the Board’s decision in its entirety where, as here, “it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.” *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 719 (D.C. Cir. 1981).

II. THE NLRB FAILED TO GIVE ADEQUATE WEIGHT TO DIRECTV’S CONFIDENTIALITY INTEREST IN THE HSP.

The existence of DIRECTV’s confidentiality interest is well-supported by the undisputed affidavit testimony of Sellers attesting that the HSP contains DIRECTV’s pricing, commission rates, service territories, service and installation processes, quality standards, sales processes, incentive structures, and links to other internal DIRECTV documents. (JA295) The HSP also requires DirectSat to protect DIRECTV’s confidential information. (*Id.*) In fact, for purposes of deciding DIRECTV’s motion, the NLRB “assum[ed] without deciding” that the HSP contained DIRECTV’s confidential information. *See* 366 NLRB No. 141, slip op. at 2. (JA298) Once the Board accepted that the HSP contained DIRECTV’s confidential information, however, it erred by ignoring DIRECTV’s confidentiality interest while denying DIRECTV’s Motion to Intervene.

A. The Supreme Court's Decision in *Detroit Edison* Requires the Board to Consider DIRECTV's Confidentiality Interest, Which It Failed to Do.

The Supreme Court has held that the Board must give weight to, and not “disserve,” an employer’s confidentiality interest in ordering information to be disclosed in response to a union’s information request. *See Detroit Edison Co.*, 440 U.S. at 315-17 (assessing employer’s obligation to provide union with employee test scores the employer asserted were confidential). In *Detroit Edison*, the Supreme Court addressed a situation in which the Board ordered an employer to disclose confidential information to a union. *Id.* at 312-13. The Court held that once an employer’s confidentiality interest had been established, as it has been here, the Board is not free to disregard that interest, and it abuses its remedial discretion in ordering disclosure, even if the information at issue was relevant and necessary to a union’s role as bargaining representative. *Id.* at 315-17.

In this case, the Board noted DIRECTV’s confidentiality interest in the HSP, but it did not otherwise weigh or take that interest into account in denying DIRECTV’s Motion to Intervene – a decision tantamount to wholly disregarding DIRECTV’s confidentiality interest, which was condemned in *Detroit Edison*. The Board’s denial of the Motion to Intervene results in the entire HSP being disclosed, including DIRECTV’s confidential information, without any consideration of the interests at stake. Just as the Board abused its discretion in

Detroit Edison by disregarding the company's confidentiality concerns, so to here it has abused its discretion by denying DIRECTV's Motion to Intervene. Indeed, this case presents even greater concerns about protecting DIRECTV's confidentiality interest against disclosure, and not "disserving" it, than did *Detroit Edison*. Because DIRECTV was not a party to the unfair labor practice proceedings that resulted in the ordered disclosure of its confidential information, the only way for it to protect its information was to intervene.

B. Analogous Cases Decided Under Federal Rule of Civil Procedure 24 Demonstrate that the NLRB Should Have Considered DIRECTV's Confidentiality Interest in Ruling on Its Motion to Intervene.

Although Federal Rule of Civil Procedure 24 is not directly applicable to the NLRB, cases decided under this rule also persuasively state that the NLRB should have weighed DIRECTV's confidentiality interest in considering DIRECTV's Motion to Intervene.⁵ Moreover, this approach is entirely consistent with the Supreme Court's instruction in *Detroit Edison*.

Under Rule 24, this Court and others have made clear that a third party's effort to protect its confidential information is an appropriate basis to intervene in a

⁵ Rule 24 is especially persuasive in the context of NLRB proceedings because "the NLRB is virtually unique among agencies in its 'long-standing reliance on adjudication' and the common-law method." *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 521 (9th Cir. 2012) (quoting Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 Duke L.J. 274, 278 (1991)).

judicial proceeding.⁶ This Court has further emphasized that the existence of the intervenor's confidentiality interest and the nature and degree of impairment of that interest must be taken into account in deciding motions to intervene. *See, e.g., Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 320 (D.C. Cir. 2015) (setting forth factors for intervention as a matter of right, including whether the intervenor has a legally protectable interest and whether the

⁶ Indeed, courts have repeatedly recognized that disclosure of a third party's confidential information is a significant interest that will highly prejudice the party whose confidential information is ordered disclosed. *See, e.g., Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52, 56-57 (9th Cir. 1960) (trade secret licensor has right to intervene where its trade secrets may be disclosed in the pending litigation); *FTC v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 667-74 (N.D. Ill. 2016) (granting motions to amend confidentiality order by intervenors, *i.e.*, the third parties who "lined up to intervene in this matter and protect their confidential information from defendants' perusal"); *J.D. Fields & Co., Inc. v. Nucor-Yamato Steel Co.*, No. 4:12-cv-00754-KGB, 2015 WL 12696208, at *4 (E.D. Ark. June 15, 2015) (granting non-party's motion to intervene for the limited purpose of protecting its confidential pricing information); *Shire Dev. LLC v. Mylan Pharm., Inc.*, No. 8:12-CV-1190-T-30AEP, 2013 WL 6858319, at *1 (M.D. Fla. Dec. 30, 2013) (finding that non-parties' interest in protecting disclosure of confidential, proprietary business information is sufficient to justify intervention under Rule 24); *Thurmond v. Compaq Computer Corp.*, No. 1:99-cv-711, 2000 U.S. Dist. LEXIS 20893, at *9 (E.D. Tex. June 26, 2000) (granting non-party's motion to intervene to the extent necessary to argue its motion for protective order to protect its confidential information); *Patt v. Family Health Sys., Inc.*, 189 F.R.D. 518, 520 (E.D. Wis. 1999) (noting that doctor was granted leave to intervene in motion for a protective order to prevent disclosure of confidential information); *Nelson v. Greenspoon*, 103 F.R.D. 118, 121-22 (S.D.N.Y. 1984) (granting third party's motion to intervene to protect potentially privileged documents, but finding the documents themselves not privileged); *Int'l Truck & Engine Corp. v. Caterpillar, Inc.*, 814 N.E. 2d 182, 577 (Ill. App. 2 Dist. 2004) (noting that in the underlying case, the court granted non-party's petition to intervene and request protective order to prevent plaintiff from disclosing confidential information in lawsuit).

action at issue impairs or impedes that interest). Additionally, as set forth in *In re Sealed Case*, 237 F.3d 657, 663-64 (D.C. Cir. 2001), this Court has found intervention was proper where the intervenor had a cognizable interest in maintaining the confidentiality of documents the Federal Election Commission (“FEC”) sought to disclose, and the intervenor’s ability to protect their confidentiality would be “forever lost” once the FEC released the information.

Here, the NLRB did not consider the purpose of DIRECTV’s motion, the nature of DIRECTV’s confidentiality interest, or the possible impairment of that interest when denying DIRECTV’s Motion to Intervene. It simply denied the motion on timeliness grounds and because DirectSat *could* have adequately represented DIRECTV’s interests (although, in actuality, it did not).⁷ See 366 NLRB No. 141, slip op. at 2-3. (JA298-99) Contrary to the Board’s approach, courts, including this one, have stated that timeliness and adequacy of representation should be assessed in light of all of the circumstances, including the length of time the intervenors knew of their interest in the case, prejudice to the existing parties, and prejudice to the movants. See, e.g., *W. Energy Alliance v. Zinke*, 877 F.3d 1157, 1164-65 (10th Cir. 2017) (discussing timeliness of motion to intervene); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293-95 (D.C. Cir. 1980) (“Adequacy of representation must be assessed in relation to the specific

⁷ The issues of timeliness and adequacy of representation are addressed *infra* at Sections III and IV.

purpose that intervention will serve;” “For the issue of timeliness, much as for the issue of adequate representation, it is important to *consider the purpose for which intervention is granted*,” and “[T]imeliness is to be judged in consideration of all the circumstances” including the purpose of the intervention and the need to preserve the applicant’s rights) (emphasis added); *see also 100Reporters LLC v. United States Dep’t of Justice*, 307 F.R.D. 269, 274-75 (D.D.C. 2014) (“The timeliness of a motion to intervene must ‘be judged in consideration of all the circumstances’”).

In sum, because a confidentiality interest was established, the NLRB abused its discretion in failing to take adequate account of the nature of, and prejudice to, DIRECTV’s confidentiality interest in denying its Motion to Intervene.

III. THE BOARD’S RULING THAT DIRECTV’S MOTION WAS UNTIMELY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Board relied on certain factual findings in determining that DIRECTV’s Motion to Intervene was untimely. The Board’s factual findings are considered conclusive if supported by “substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e). Although this is a deferential standard, the Board’s holding that DIRECTV’s Motion to Intervene was untimely fails to meet it. As explained below, the Board’s factual findings regarding DIRECTV’s notice ignored the unrebutted record evidence and resulted in a conclusion that is contrary to Board precedent and other legal authority on the issue of timeliness.

A. The Board's Factual Findings Regarding DIRECTV's Notice Are Contrary to the Record Evidence.

The record is clear as to what DIRECTV knew and when it knew it. As Sellers stated, DIRECTV had discussions “[i]n November/December 2016” with DirectSat about producing a redacted copy of the HSP that DIRECTV believed arose in the context of DirectSat’s negotiations to resolve an NLRB charge. (JA295-96 (emphasis added)) When DIRECTV did not hear anything more from DirectSat, it “believed the issue had been resolved.” (*Id.*) Sellers further stated that “DIRECTV did not receive notice of this case as contemplated by the HSP and had no knowledge of the proceedings before the Administrative Law Judge and NLRB, until...the Board’s March 20, 2018 decision.” (*Id.* (emphasis added))

From these statements, the Board drew the conclusion that DIRECTV “filed its motion long after it knew or reasonably should have known that this proceeding could result, and indeed had resulted, in an order requiring full disclosure of the HSP.” 366 NLRB No. 141, slip. op at 2. (JA298) There was no evidence to support a finding that DIRECTV actually knew an ALJ or Board proceeding could result or had resulted, and it was likewise pure supposition to state that DIRECTV “should have known” of the proceeding. Nevertheless, the Board held that DIRECTV’s Motion to Intervene was untimely because it had “ample notice and opportunity to seek intervention much earlier in the proceeding, but did not.” *Id.* But “[s]uch rank speculation cannot form the basis of a sound administrative

finding.” *See Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012) (Board’s finding of no impasse was not supported by substantial evidence where it was based on the Board’s “intuitive belief” that union and employer would have made concessions upon further bargaining).

The Board’s conclusion directly contradicts Sellers’s unequivocal and un rebutted testimony. First, the evidence establishes that DIRECTV only had knowledge of an NLRB charge, and NLRB charges are often withdrawn or settled before disposition by an ALJ or the Board.⁸ Indeed, DIRECTV believed DirectSat was in the process of resolving the charge, making an ALJ or Board order requiring disclosure a remote and distant possibility. Second, DIRECTV only had discussions with DirectSat about producing a redacted copy of the HSP. This suggested to DIRECTV nothing more than that DirectSat was working towards an acceptable resolution with the Union, and that, in doing so, DirectSat was aware of its confidentiality obligations and taking necessary steps to fulfill them. Nevertheless, the Board made a logical leap to conclude that DIRECTV “should have known that this proceeding could result...in an order requiring full disclosure of the HSP.” 366 NLRB No. 141, slip. op at 2 (emphasis added). (JA298)

⁸ In fact, the Board’s website states that “[m]ore than half of all charges are withdrawn or dismissed. In cases where an investigation finds probable merit, the majority settle by agreements between the parties.” *See Charges and Complaints*, NLRB, *available at* <https://www.nlr.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints> (last accessed Nov. 15, 2018).

Finally, the Board notes that DIRECTV “cannot and does not dispute that, months before this case was submitted to the judge, it was aware that a proceeding was underway that could affect its confidentiality interest in the HSP.” *Id.* While this may be true in the broadest sense (to the extent the initial filing of an NLRB charge constitutes a “proceeding”), the Board’s expectations for DIRECTV’s actions are disproportionate to DIRECTV’s actual knowledge. Again, the unrebutted evidence shows only that DIRECTV discussed DirectSat providing a redacted copy of the HSP to the Union to resolve an NLRB charge. (JA295-96) While such an action may implicate DIRECTV’s confidentiality interest, there is no evidence that DIRECTV had reason to believe that its confidentiality interest was at risk or that further action was needed to protect its interest. Indeed, it is undisputed that no one advised DIRECTV that DirectSat’s attempted resolution (providing a redacted copy of the HSP) was not achieved, or that the case was being submitted to an the ALJ or to the Board.

Under these circumstances, the Board’s holding puts an impossible burden on DIRECTV to monitor the collective bargaining negotiations and administrative agency activities of its subcontractors and vendors, and the information produced in connection with same. Thus, the Board’s factual findings with respect to DIRECTV’s knowledge are contrary to the record and have resulted in a decision that is both unreasonable and lacking substantial evidence.

B. Under the Circumstances, the Board's Timeliness Holding Is Contrary to Board Precedent and Other Legal Authority.

In denying DIRECTV's Motion to Intervene as untimely, the Board relied on the fact that DIRECTV not only filed its motion "over 8 months after the judge ruled that the HSP should be disclosed" but also "after the Board had already issued its decision." *See* 366 NLRB No. 141, slip op. at 2. (JA298) However, DIRECTV's failure to file its motion until after the Board issued its decision did not, in and of itself, render its motion untimely under either Board precedent or other legal authority.

The Board recently addressed posthearing intervention in *The Boeing Co.*, 366 NLRB No. 128 (July 17, 2018), which overruled the standard for evaluating the lawfulness of workplace rules set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).⁹ Subsequent to the issuance of the Board's decision in *Boeing*, the Board sought remand of a case pending in the U.S. Court of Appeals for the Ninth Circuit that had found violations based on *Lutheran Heritage*. The union, after opposing the remand, filed a posthearing motion to intervene in *Boeing*. In denying intervention, the Board stated that "[n]o provision is made in the Board's rules for intervention after the close of the hearing, let alone after the Board has issued its decision." *Id.*, slip op. at 2. Despite this statement, however,

⁹ This decision was issued just a week prior to the Board's decision in this case, but it was not referenced in the Board's July 25, 2018 Order.

the majority acknowledged in an extended footnote that “in rare circumstances, the Board has permitted posthearing intervention.”¹⁰ *Id.*, slip op. at 2 n. 3. As the Board put it in the *Boeing* decision, all of the cases cited have one similarity: “the would-be intervenor possessed an interest that could only be protected by granting intervention.” *Id.* As discussed in Section II, DIRECTV, like the intervenors in these cases, is subject to a decision that directly impacts its interest, and it has no other avenue to adequately protect that interest. Therefore, its situation is analogous to those in which the Board has permitted posthearing intervention.

Similarly, federal courts, including this one, have permitted late-stage and post-judgment intervention under Rule 24, especially where it is necessary for the party to preserve some right which cannot otherwise be protected.¹¹ As this Court

¹⁰ Citing *Drukker Commc’n*, 299 NLRB 856 (1990) (permitting posthearing intervention by entity that had purchased the respondent’s assets and was therefore exposed to potential successor liability); *Premier Cablevision*, 293 NLRB 931 (1989) (same); *Postal Serv.*, 275 NLRB 360 (1985) (permitting posthearing intervention by national union, where respondent claimed that national union and not charging party local union represented the bargaining unit); *William Penn Broadcasting Co.*, 94 NLRB 1175 (1951) (permitting posthearing intervention by union #2, with which respondent had entered into a renewal collective-bargaining agreement at a time when a representation petition filed by charging party union #1 was pending before the Board).

¹¹ See, e.g., *Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 65 (1st Cir. 2008) (while intervenor was aware of lawsuit for nine months before seeking intervention, application for intervention was timely because she had reason to believe her interests would be protected by existing party until shortly before the time she sought intervention); *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 671 (8th Cir. 2008) (upholding post-judgment intervention where the

has found, the timeliness of a motion to intervene must be considered in light of all the circumstances of the case, including the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the possibility of prejudice to the existing parties. *See Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1294-95). This Court has explained that “the salient factor” is not when the motion to intervene was filed with respect to the filing of the original case, or even with respect to the issuance of a court's order—it is when the intervenor “knew or

likelihood of prejudice to the intervenor, who could permanently lose the opportunity to collect any proceeds, outweighed any prejudice to the party opposing intervention, who would only be delayed in collecting the judgment); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (motion to intervene by government was timely after default judgment and before trial on damages when motion was made less than 30 days after officials became aware that litigation would affect U.S. interests); *United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) (motion to intervene was timely even though filed after lengthy settlement negotiations when motion was filed promptly after intervenors first had notice that settlement was contrary to their interests); *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004) (post-judgment intervention was not untimely when government sought to intervene to challenge subject matter jurisdiction in case with great impact on government's conduct of foreign policy), *abrogated on other grounds by Rep. of Iraq v. Beaty*, 556 U.S. 848 (2009); *Am. Tel. & Tel. Co.*, 642 F.2d at 1294-95 (finding post-judgment motion to intervene was timely because it was filed soon after it was reasonable to expect that party would not adequately represent intervenor's interests); *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181-82 (3d Cir. 1994) (granting motion to intervene filed four years after litigation began where intervenor relied on government's assurances that its interests were not at stake); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 266 (5th Cir. 1977) (noting that “whether the request for intervention came before or after the entry of judgment [is] of limited significance”).

should have known that any of its rights would be directly affected by this litigation.” *See Nat’l Wildlife Fed. v. Burford*, 878 F.2d 422, 433-34 (D.C. Cir. 1989), *rev’d on other grounds sub nom., Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990) (granting intervention where the record showed intervenor promptly filed its motion after learning that its claims had been suspended by a preliminary injunction).

Upon learning of the Board’s March 20, 2018 Order, DIRECTV promptly filed its Motion to Intervene on April 4, 2018. Therefore, DIRECTV did not sit on its rights, but instead took action as soon as it learned that they were in jeopardy. Moreover, when a motion to intervene is “filed before the deadline for [production of the confidential information at issue], ...any prejudice resulting...from the perceived delay is minimal.” *See DeVault v. Isdale*, No. 6:15-cv-135-Orl-37TBS, 2015 U.S. Dist. LEXIS 137684, at *9 (M.D. Fla. Oct. 8, 2015). Because the Board’s Order to produce the unredacted HSP was not self-enforcing, and the Board still had jurisdiction over the case at the time DIRECTV filed its Motion to Intervene, DIRECTV’s motion has not delayed this case or resulted in prejudice to the Union. *See* 29 U.S.C. § 160(d) – (f) (the Board may modify or set aside any finding or order until the record in a case has been filed, at which point the court’s jurisdiction becomes exclusive); Doc. No. 1731817 (May 5, 2018) (granting NLRB’s motion to extend time to file record until 7 days after the NLRB ruled on

DIRECTV's motion). Therefore, while DIRECTV did not move to intervene until after the Board's Order issued, it was not automatically untimely under either Board law or analogous federal precedent.

IV. THE BOARD ERRED IN HOLDING THAT DIRECTSAT ADEQUATELY REPRESENTED DIRECTV'S INTERESTS IN THIS CASE.

Even if DIRECTV's Motion were timely, the Board majority concluded that DIRECTV was not a "necessary party" to the case because DirectSat and DIRECTV shared a "community of interest" in protecting the HSP's confidential information, and therefore, DirectSat could adequately defend DIRECTV's interest. Again, the Board's analysis of DirectSat's representation of DIRECTV and its confidentiality interest is at odds with the decisions of the courts on analogous issues and is also belied by the record.

A. A Shared "Community of Interest" Does Not Guarantee Adequate Representation.

As a result of the contractual obligations imposed on DirectSat by the HSP with respect to protecting DIRECTV's confidential information, the Board determined that "[DirectSat's] confidentiality interest in the HSP is commensurate with, if not defined by, DIRECTV's." 366 NLRB No. 141, slip op. at 2. (JA298) Yet, in the intervention context, courts have recognized that having aligned or shared interests with one of the parties does not guarantee that the intervenor's interest in protecting its confidential information will be adequately represented.

First, the intervenor has the most information regarding the need to withhold its confidential information and the value of its confidential information; therefore, the intervenor has the strongest motivation to protect it. *See, e.g., J.D. Fields & Co., Inc.*, 2015 WL 12696208, at *4 (finding that, although defendant and intervenor both opposed plaintiff's motion to compel, intervenor had better understanding of value of confidential information and stronger motivation to protect its own confidential information); *Thurmond*, 2000 U.S. Dist. LEXIS 20893, at *8 (“[I]t should be self-evident that no person or entity has a greater incentive to protect confidential and proprietary SANYO information than SANYO itself”).¹² This reasoning applies equally to this case. Although DirectSat may be legally obligated to protect DIRECTV's confidential information, DIRECTV is always going to better understand the reasons for protecting such information and have stronger incentives to fight against disclosure.

Second, even where the intervenor and a party are aligned with respect to their ultimate objective, *i.e.*, non-disclosure, the party often has competing interests

¹² *See also 100Reporters LLC*, 307 F.R.D. at 281 (“[T]he DOJ has neither the incentives nor the information necessary to represent fully Siemens's commercial and competitive interests”); *Am. Tel. & Tel. Co.*, 642 F.2d at 1294 (recognizing that although the government had asserted the intervenor's work product privilege, the “[intervenor] has a much stronger interest in the protection of its work product” than the government); *Northrop Grumman Info. Tech., Inc. v. United States*, 74 Fed. Cl. 407, 420 (2006) (“[W]hile it is true that the government has a statutory duty not to release Lockheed's proprietary information . . . it may very well not vociferously protect Lockheed's secrets as Lockheed would”).

that may take precedence over protecting the intervenor's confidential information. For this reason, this Court has allowed intervention for the purpose of protecting confidential information in Freedom of Information Act ("FOIA") litigation, even where the intervenor and the government entity agreed on a legal position, such as withholding the documents at issue. *See, e.g., Gov't Accountability Project v. Food & Drug Admin.*, 181 F. Supp. 3d 94, 96 (D.C. Cir. 2015); *100Reporters LLC*, 307 F.R.D. at 280. Despite their identical legal positions, however, the government's primary interest is in fulfilling its FOIA obligations, whereas the intervenor's primary interest is in preventing disclosure of its confidential materials. *Id.* Similarly, although DirectSat and DIRECTV both oppose disclosure of the unredacted HSP, DirectSat has a competing interest in fulfilling its obligation to bargain in good faith with the Union, whereas DIRECTV's sole interest is protecting its confidential information. This divergence of interests satisfies DIRECTV's minimal burden of showing inadequate representation. *See Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (describing the intervenor's burden as "not onerous").

B. The Record Establishes That DirectSat's Representation Was Inadequate Because DirectSat Failed to Assert a Confidentiality Defense.

The reasons for allowing intervention to protect confidential information identified above are born out in this case. Although the Board approached the

question of adequate representation from a purely theoretical perspective, positing that that DirectSat “*could* have adequately defended [DIRECTV’s] interest before the Board” and that it was “fully capable of representing DIRECTV’s interests in this case,” there is simply no need to consider what DirectSat *could* have done or its potential capabilities or defenses because the record contains *actual* evidence of DirectSat’s inadequate representation. 366 NLRB No. 141, slip op. at 2 (emphasis added). (JA298)

It is undisputed that, despite having the “same panoply of defenses” available, DirectSat “did not, at any point, object to disclosing the full HSP on grounds that doing so could reveal information of a confidential, proprietary, or trade-secret nature.” *DirectSat USA, LLC*, 366 NLRB No. 40, slip op. at 2 n.4 (emphasis added). (JA259) Nor did DirectSat “assert a confidentiality interest in its exceptions” to the ALJ’s order that it produce the undredacted HSP. *Id.* This failure to raise *any* confidentiality issue further proves that DirectSat’s interests are not identical to DIRECTV’s interests. This is not a case where there is a hypothetical danger that the party to the litigation may argue the confidentiality defense less “vociferously” than the intervenor would. Rather, there is actual evidence that DirectSat simply did not make this argument at all.

As a result, DirectSat waived any argument that the HSP was confidential, and DirectSat was prevented from raising a confidentiality defense, either before

the Board or on appeal to this Court. Therefore, the only option available for DIRECTV to protect its confidentiality interest in the HSP was to file a motion to intervene after it received notice of the Board's order.

Had DIRECTV been permitted to intervene and raise a confidentiality defense, it would have had an opportunity to offer an accommodation that served the Union's need for the information while protecting its confidentiality interest—an opportunity that DirectSat waived by focusing solely on relevance. *See Prime Healthcare Servs.-Encino LLC v. NLRB*, 890 F.3d 286, 296 (D.C. Cir. 2018) (noting that if the information at issue was privileged or confidential, the employer would have been required to provide the union with a reasonable accommodation to ensure it received the information it needs to perform its duties). This case is similar to those cases in which post-judgment intervention has been granted because any adequacy of representation DirectSat could have provided in this matter is now lost. *See, e.g., Acree*, 370 F.3d at 50 (finding a post-judgment motion to intervene to be timely where the potential inadequacy of representation came into existence only at the appellate stage); *Smoke*, 252 F.3d at 471 (reversing denial of post-judgment motion to intervene where intervenor's interests were no longer adequately represented by party).

C. DirectSat's Relevance Defense Was Insufficient to Protect DIRECTV's Confidentiality Interest.

The Board also departed from its own precedent in treating DirectSat's

failure to raise a confidentiality defense as a mere difference in litigation strategies, noting that DirectSat raised “other defenses,” including relevance, which “as a practical matter would have addressed DIRECTV’s confidentiality concerns.” *DirectSat USA, LLC*, 366 NLRB No. 141, slip op. at 3 n.8. (JA299) Relevance and confidentiality are not interchangeable considerations. Rather, they must be balanced against each other when determining whether an employer must provide requested information to a union. *See Detroit Edison Co.*, 440 U.S. at 317-18 (union’s interest in arguably relevant information must be balanced against employer’s confidentiality interest). Therefore, even though DirectSat failed to establish its lack-of-relevance defense, it is still possible that DirectSat could have prevented disclosure of the HSP by raising a confidentiality defense. *Id.* (finding employer did not violate Act by failing to disclose employee test scores, even though they were arguably relevant). For this reason, contrary to the Board’s conclusion, DirectSat’s assertions of relevance alone were not sufficient to adequately defend DIRECTV’s confidentiality concerns.

Although minor differences in litigation tactics are insufficient to establish inadequate representation, whether or not the party to the litigation raises the same legal arguments advanced by the intervenor should be relevant to the analysis. *See, e.g., Sevier v. Lowenthal*, 302 F. Supp. 3d 312, 323 (D.C. Cir. 2018) (denying intervention where party advanced all of the same legal theories and arguments as

proposed intervenors did in their motions); *Jones v. Prince George's Cnty., Md.*, 348 F.3d 1014, 1020 (D.C. Cir. 2003) (denying intervention because mere difference in litigation tactics did not establish inadequate representation); *Bldg. & Const. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (holding that proposed intervenor had failed to carry its burden because it had “offered no argument not also pressed by” the plaintiff); *Atl. Refinishing & Restoration, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 272 F.R.D. 26, 30 n.2 (D.D.C. 2010) (general contractor showed that surety was not raising a defense available to the general contractor, thus rebutting the presumption of adequacy of representation). This consideration is especially significant where, as in this case, a party’s failure to assert a confidentiality defense results in the waiver of that argument in the pending case, and destroys the intervenor’s ability to protect its confidential information. Accordingly, the Board erred in denying DIRECTV’s Motion to Intervene on the basis that it was not a necessary party because DirectSat could adequately defend its interests.

CONCLUSION

For each of the reasons set forth above, DIRECTV, LLC’s Petition for Review should be granted, the Board’s Order requiring DirectSat USA, LLC to provide the full, unredacted copy of the HSP to the Union should be denied enforcement, and this case should be remanded to the NLRB. DIRECTV, LLC

further requests that it be awarded its costs and any other relief, legal or equitable, to which it is entitled.

Dated: February 1, 2019

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,574 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman Font 14.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2019, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

Respectfully submitted,

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